



STATE OF MICHIGAN  
COURT OF APPEALS

ELIZABETH GLEICHER  
JUDGE

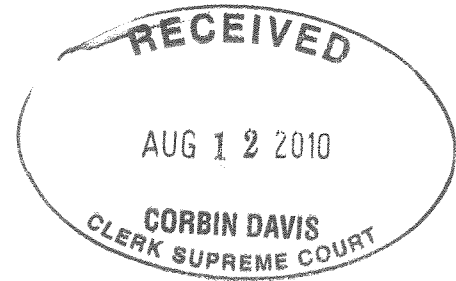
August 11, 2010

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Mr. Corbin R. Davis  
Chief Clerk  
Michigan Supreme Court  
P.O. Box 30048  
Lansing, MI 48909

Re: ADM File No. 2009-19  
Proposed Amendments of MCR 6.425, 6.502, 7.204, and 7.205

Dear Mr. Davis:



As its Chair, I write on behalf of the Rules Committee of the Michigan Court of Appeals, in response to the Supreme Court's publication of the above proposed rule amendments.

The amendments referenced in ADM 2009-19 cut a wide swath through the court rules governing the time for initiating appeals in the Court of Appeals. This Court did not propose the amendments, and the Rules Committee is unable to identify any problems presented by the time lines set forth in the current rules. We recommend that the Supreme Court refrain from adopting the proposed rules. We believe that our present system works well.

In the event that the Supreme Court concludes that the proposed amendments should be further considered, we offer the following comments.

**MCR 7.204(B)**

*Avoid Alternative B That Allows Trial Court Decision on Motions to Extend Time in the Court of Appeals.* The proposed amendment labeled as 7.204(B) is a new section that allows extensions of time for filing claims of appeal. Two alternatives are offered for comment: alternative A allows extensions of time to be granted by the Court of Appeals, and alternative B allows extensions of time to be granted by the trial court. The Rules Committee strongly urges the Supreme Court not to adopt an amendment that leaves this determination to the trial courts.

*Court of Appeals Best Positioned to Decide Motions to Extend Time in The Court of Appeals.* The Court of Appeals is best positioned to implement consistent, statewide application of an excusable neglect standard applicable to motions to extend time for filing claims of appeal. This is new standard in this context, and it will best serve the administration of justice if it is developed and applied as consistently as possible from one case to the next. Further, allowing trial courts to dispose of such requests puts an aspect of the jurisdiction of this Court in the

hands of other courts, and deprives this Court of the right to review and decide questions regarding its own caseload. Finally, if a trial court denies a motion to extend time to file a claim of appeal, that order could be the basis for an application for leave to appeal. Consigning such a decision to review by two courts is not a good use of judicial or attorney resources. This Court should decide at the outset of an appeal whether to grant an extension of time, rather than confronting that question on appeal from the trial court.

*Short Extensions to File Claims of Appeal May Be Useful.* Excusable neglect is defined in Black's Law Dictionary (8th ed) as: "A failure — which the law will excuse — to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party." An amendment allowing a short, 35-day extension of time because of excusable neglect in filing a claim of appeal is a concept that has some merit. It affords appellants a slightly expanded window for filing an appeal by right without the need for preparation of a full application for late appeal under MCR 7.205(F). This option need not exist in opposition to an application for late appeal, however, but rather as a useful alternative that can be implemented when the failure comes to light in time to take advantage of the 35-day extension.

*Motion to Extend Should Be Filed With Late Claim of Appeal.* If Alternative A is adopted as part of MCR 7.204 regarding claims of appeal, the Rules Committee recommends that the request for extension should always be made by written motion filed simultaneously with the untimely claim of appeal. Submission of the claim of appeal provides the information necessary to open a case file in which the motion and subsequent order can be entered. It also establishes other jurisdictional elements for the case so that jurisdiction as a whole can be evaluated at one time. Our recommendation would thus read as follows. The 7-day period for filing an answer can be eliminated because it is stated by default in MCR 7.211(B)(2)(e).

(B) Extension of Time for Filing Claim of Appeal. Upon motion showing excusable neglect, the Court of Appeals may extend the time for filing the claim of appeal by any party for a period not to exceed thirty-five days from the expiration of the time otherwise prescribed by this rule. A motion requesting an extension of time under this rule must be accompanied by the claim of appeal. This provision notwithstanding, the time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

*Amend MCR 7.216(B).* Note should also be made that if this Court is provided the option of extending the time to file a claim of appeal, an amendment will be required in MCR 7.216(B) which limits this Court's authority to extend time to "any nonjurisdictional act." Further, consideration should be given to repealing MCR 6.428, which presently permits the trial court to issue an order restarting the time in which to file an appeal of right in a criminal case, under prescribed circumstances, if counsel failed to file the claim of appeal on time.

## MCR 7.205

*Retain Late Applications Under MCR 7.205(F).* The proposed amendment of MCR 7.205 would completely repeal subrule (F), which permits the filing of late applications for leave. Our very strong preference is to retain the option to file a late application under MCR 7.205(F) that can be disposed by this Court. The process is in place; the filers and the Court know how to apply it; the explanation for the delay can be assessed by the Court without the necessity of applying the new “excusable neglect” standard that is undefined in the rule.

*Criminal Appeals by Leave Require Additional Time.* In criminal appeals, a substantial number of applications are filed in cases arising from guilty pleas. The present workloads of the trial courts and appointed counsel make it virtually impossible for counsel to be appointed and prepare a useful application for leave to appeal within 21 days of a guilty plea. Orders appointing counsel can take some time to enter and counsel must then await the preparation of the transcript before having the necessary documentation from which to draft an application for leave. If transcripts are not completed within the deadline, counsel may be relegated to filing a provisional application with a motion to extend time to file the full application. But such a process would not be an efficient use of resources for appointed counsel or this Court. Appointed counsel could perhaps use newly proposed MCR 7.205(A)(3) as the basis for a motion to withdraw the plea solely in order to secure more time to prepare the application, but this is likewise not an effective use of resources.

*Late Applications Could Be Limited to Six Months.* Granting that a 12-month deadline for a late application for leave to appeal may be longer than necessary, the Rules Committee recommends a reduction from 12 months to 6 months rather than complete elimination of the option. Some cases naturally require additional time to receive the record and prepare a useful application for leave to appeal. Some clients require time to find the money to fund applications for leave to appeal or even make the decision whether to proceed. Six months should be adequate for these purposes; not accommodating them likely will lead to poorly drafted filings founded on incomplete records. That said, the Rules Committee reiterates our view that this Court is not disadvantaged by the present system. We foresee potential disadvantage by repeal of the rule permitting late applications for leave to appeal.

*Late Application Needed If Extension Of Time To File Claim is Denied.* Retaining the option of a late application for leave to appeal is also implicated in the process of requesting an extension of time to file a claim of appeal. If the motion for extension of time is denied, and the appeal is dismissed as untimely filed, appellant would be deprived of the opportunity to file a late application if MCR 7.205(F) is repealed. (Alternatively, the rules will require amendment to direct that the time for filing an application is stayed while a motion to extend time to file the claim of appeal is pending.)

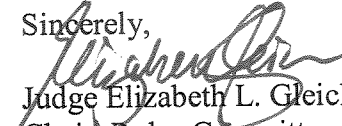
*Repeal of Late Application May Make More Defendants Vulnerable to Ineffective Assistance of Appointed Counsel in Criminal Appeals.* This amendment may also lead to an increase in cases such as *People v Dante Antoine Rogers*, 485 Mich 1003 (2009), where the Supreme Court remanded to this Court for reconsideration of an application for leave to appeal from an order in a MCR 6.500 case, and directed this Court to apply the standard for direct appeal because defendant had been deprived of his earlier direct appeal due to constitutionally ineffective assistance of counsel. Counsel was ineffective because he filed the application in the

direct appeal beyond the 12-month deadline in MCR 7.205(F). If the amendment is adopted and counsel must file within the very short timeline proposed, it is reasonable to expect that more appeals will be dismissed due to counsel's failure to meet the new filing deadline.

*Retain MCR 7.205(F)(2) and (F)(5).* If MCR 7.205(F) is repealed or otherwise substantially amended, MCR 7.205(F)(2) should be retained because it directs that a criminal defendant may not file an application regarding conviction/sentence if a claim of right has been filed regarding that conviction/sentence. And MCR 7.205(F)(5) should be retained because it is a recent amendment requested by the Court of Appeals to provide filers with recourse when claims of appeal are dismissed for lack of jurisdiction that is discovered somewhat later in the appeals.

The Rules Committee appreciates this opportunity to communicate our views to the Supreme Court. I have personally discussed the substance of this letter with Chief Judge Murphy, who is in agreement with the Rules Committee's approach to the issues presented. Should the Supreme Court desire input from the entire Court of Appeals bench, the Rules Committee will place the issue on the agenda for this Court's next meeting in December 2010.

Sincerely,



Judge Elizabeth L. Gleicher  
Chair, Rules Committee

cc: Supreme Court Justices  
Chief Judge William B. Murphy  
Court of Appeals Judges  
Sandra Mengel, Rules Committee member  
Douglas Messing, Rules Committee member  
Larry Royster, Rules Committee member  
Anne Boomer, Supreme Court Administrative Counsel